IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1036 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAMESH @ BHADO RAMJIBHAI BAVALIYA - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1,
MR US BRAHMBHATT for Appellant(s) : 1,
MR SP HASURKAR, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 17/04/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE ANIL R. DAVE)

1. Being aggrieved by the judgement and order dated 28th April, 2006 passed in Sessions Case No. 33/2005 by the learned Additional Sessions Judge, Fast Track Court No. 3, Surendranagar, this appeal has been filed. By virtue of the impugned judgement, the appellant has been held guilty of the charges levelled against him and he has been sentenced to Rigorous Imprisonment for 8 years and a fine of Rs. 5,000/-, in default of payment, Simple Imprisonment for 6 months for committing an offence under Section 376 of the Indian Penal Code.

2. **ADMIT.**

3. When this appeal was notified for hearing on 30th March, 2007, looking to the peculiar facts of the case and in pursuance of a request made by the learned advocates, Record and Proceedings had been called for. Record and Proceedings had already been received and in pursuance of a request made by the learned advocates, the appeal has been finally heard today. As the learned advocates have submitted that the relevant record to be perused is not much and paper book might not be required and as both the learned advocates are having copies of relevant record, the appeal has been finally heard today.

4. In view of observation made by the Hon'ble Supreme Court in the case of **STATE OF KARNATAKA Vs PUTTARAJA, 2003 AIR SCW 6429,** name of the victim has

not been stated and she has been referred to as “the victim” in this judgement.

5. The prosecution case, in a nut shell, before the Sessions Court was as under;

5.1. The appellant, a mason, was working at a temple, which was being constructed with the help of residents of Village Navagam. On 1st May, 2005, around 2:30 p.m., when the victim was at her residence alongwith her younger brother and sister, the appellant visited her place. It was the case of the prosecution that the appellant used to dine at the place of the victim, as mother of the victim, Bhartiben, P.W. No. 1 (Exh. 14) used to offer food or place for having food to the appellant. It is worth noting here that a temple of Ramapir was being constructed with the help of residents of the village and the persons working at the temple were rendering their voluntary services and in view of that fact, other villagers were also helping those who were rendering their services in the process of construction of the temple. For the aforestated reason, the appellant was helped by mother of the victim and the appellant used to visit the place of the victim very often.

5.2. The appellant asked the victim's younger brother and sister, namely, Raju and Puja, respectively, to go out and get “pan” for him and, thereafter, he went in their room and asked the victim to get some

prepared vegetable for him. When the victim went in the room, the appellant caught hold of the victim and raped her. The victim, being very young, could not understand much before she was caught but when she was held very tight by the appellant and when she was being raped, she found it very painful and, therefore, she cried. Her private part started bleeding and thereafter the appellant ran away. As petticoat of the victim was stained with blood and even the area where she was raped was having blood stains, the victim tried to wipe the blood with a T-shirt of her brother and as there was nobody at her residence, she went to complain about the said incident to her mother, Bhartiben, P.W. No. 1 (Exh. 14), who had gone to the place of maternal uncle of the victim.

5.3. Ultimately, the victim, her mother and one of her close relatives, Amarsingh, went to Chotila Police Station, where First Information Report was filed by Bhartiben, P.W. No. 1 (Exh. 14), mother of the victim.

5.4. In pursuance of the First Information Report filed by the victim, the victim was taken to the Medical Officer, Dr. Kavitaben Dudhrejia, P.W. No. 12 (Exh. 46) at Rajkot where the victim was examined. It was found by Dr. Kavitaben Dudhrejia, P.W. No. 12 (Exh. 46) that hymen of the victim was torn and her private part was bleeding.

5.5. In pursuance of the First Information Report given by complainant, Bhartiben, P.W. No. 1 (Exh. 14), the appellant was arrested on the same day when he was found sleeping near the temple after having his bath. The appellant was medically examined by Dr. Jeetendra Rathod, P.W. No. 3 (Exh. 18) who found the appellant capable of having physical intercourse. In the course of the trial, the following important witnesses were examined.

(1)The complainant, Bhartiben, P.W. No. 1 (Exh. 14)
(2)The victim, P.W. No. 2 (Exh. 16)
(3)Dr. Ishwarbhai Mackwana, P.W. No. 10 (Exh. 40)
(4)Dr. Jeetendra Rathod, P.W. No. 3 (Exh. 18)
(5)Dr. Kavitaben Dudhrejia, P.W. No. 12 (Exh. 46)
(6)Panch witnesses, Ashokbhai, P.W. No. 4 (Exh. 22), Vinubhai, P.W. No. 5, (Exh. 24) and Rajubhai, P.W. No. 6 (Exh. 26)
(7)Inquiry Officer, PSI Hardevsingh, P.W. No. 8 (Exh 31)

5.6. The following relevant documents were considered by the Sessions Court;

(1)First Information Report, (Exh. 15)
(2)Medical Certificate of Dr., who examined the appellant, (Exh. 20)
(3)Panchnama of clothes of the appellant (Exh. 23)
(4)Panchnama of place of offence (Exh. 25)
(5)Panchnama of clothes of the victim (Exh. 27)
(6)Birth certificate of the victim (Exh. 35)

(7)Report of the Forensic Science Laboratory (Exh. 37)

5.7. The Sessions Court considered the evidence adduced before it and came to the conclusion that the victim had been raped by the appellant.

5.8. For coming to the aforestated conclusion, the Sessions Court has considered the evidence of the complainant, Bhartiben, P.W. No. 1 (Exh. 14), who had filed First Information Report as the victim was hardly 13 years old. The complainant has given details with regard to the incident and has stated that the appellant used to dine at the residence of the complainant as her house was not much far from the temple, which was being constructed in the village.

5.9. The Sessions Court has also considered the evidence of the victim, though the victim was hardly 13 years old. The learned Judge has found that she was understanding sanctity of oath and, therefore, her evidence has been considered by the Sessions Court. In her evidence, the victim has given details as to how the appellant came to her house and asked her brother and sister to go out so as to get “pan” for him and, thereafter, he raped the victim. The victim appeared to be quite truthful to the learned Judge and her evidence has been noted in her own words. She has stated as to how, after being raped

she was having pain and she had run to see her mother at her maternal uncle's place. She has given details with regard to the bleeding, which she had and the pain which she had suffered. She has also given details with regard to her petticoat on which blood stains were found. In the cross examination, the victim was found quite truthful and there does not appear to be any reason to disbelieve such a young girl who had no reason to tell lies or to level false allegations against the appellant.

5.10.On the basis of medical evidence, it has been found that the appellant was a healthy man capable of having intercourse and as he had already taken bath at the time when he was examined, no smegma was found from his penis. However, sperm had been found from the towel, which the appellant had used.

5.11.So far as the victim is concerned, because of excessive bleeding, from vaginal swab, only blood could be found.

5.12.Thus, looking to the evidence of the victim and other evidence, Sessions Court has come to the conclusion that the appellant had committed the offence and, therefore, he has been sentenced to Rigorous Imprisonment for 8 years and a fine of Rs. 5,000/- had been imposed upon him, in default of payment, he has to undergo Simple Imprisonment for 6 months.

6. Learned advocate Shri Brahmbhatt appearing for the appellant has submitted that the appellant has been falsely involved in the case and in fact the appeal should be allowed and the order of conviction should be quashed and set aside.

7. It has been submitted by him that the First Information Report had not been filed by the victim but it had been filed by Bhartiben, P.W. No. 1 (Exh. 14), mother of the victim. According to him, the said witness had no personal knowledge with regard to the offence and, therefore, no action should have been initiated in pursuance of the First Information Report filed by her.

8. It has been thereafter submitted by him that the medical evidence is not sufficient to implicate the appellant. It has been submitted by him that upon examining the victim, it had been found by Dr. Kavitaben Dudhrejia, P.W. No. 12 (Exh. 46) that the victim could have been raped. The said opinion was given as the Doctor had found injuries on the private parts of the victim. But according to the learned advocate, there is no deposition by Dr. Kavitaben Dudhrejia, P.W. No. 12 (Exh. 46) that the victim had been raped and, therefore, benefit of doubt should be given to the appellant. It has been further submitted by him that there was no injury on the private parts of the appellant and, therefore, the appellant was not involved in the offence. According to him, if the victim, a girl of tender age, had been

raped, the appellant would have also suffered some injury and as no injury was found on the penis or body of the appellant, it cannot be said that the appellant had committed the offence. These are the only submissions made by learned advocate Shri Brahmbhatt so as to substantiate his case.

9. On the other hand, learned APP Shri Hasurkar has strongly supported the judgement and the quantum of punishment imposed upon the appellant. He has taken us through the relevant evidence of the judgement giving details with regard to the circumstances, which implicate the appellant in the offence.

10. It has been mainly submitted by the learned APP that the date of birth of the victim is 2nd August, 1991. According to him, age of the victim was 13 years, 8 months and 29 days whereas the accused is 24 years old, mature and reasonably strong person. It has been submitted by him that he must be physically strong and according to the evidence of Dr. Jeetendra Rathod, P.W. No. 3 (Exh. 18), the appellant was capable of having intercourse and, therefore, looking to the truthful evidence adduced by the victim, there should not be any reason to discard the conclusions arrived at by the learned Additional Sessions Judge.

11. It has been submitted by the learned APP that though it is doubtful whether the mother of the victim was providing food or was providing place for having his food, it is at least apparent that the

appellant was done favour by the mother of the appellant as the appellant used to dine at the residence of the victim. The appellant has misused the favour done to him by the mother of the victim and in such a case, for committing rape on a girl of tender age, in fact, more severe punishment should have been inflicted upon the appellant.

12. We have heard the learned advocates at length and have considered ocular as well as documentary evidence and have carefully gone through the record and proceedings pertaining to the case.

13. Upon hearing the learned advocates and upon appreciation of the evidence, in our opinion, no error has been committed by the learned Additional Sessions Judge while holding the appellant guilty of the offence of rape and inflicting punishment upon the appellant.

14. We do not find any substance in the submissions made by learned advocate Shri Brahmbhatt. Simply because the First Information Report was filed by the mother of the victim, it cannot be said that the investigating agency should not have taken any action as the mother of the victim, Bhartiben, P.W. No. 1 (Exh. 14) did not have any personal knowledge. She is the mother of the victim and the victim, a girl of a tender age, had complained about the rape to her when the victim's mother had gone to her brother's place. Upon the facts being reported to her,

alongwith her relative, she had gone to Chotila Police Station with the victim and the First Information Report was filed. We do not see any substance in the said submission and, therefore, we discard the same.

15. So far as medical evidence is concerned, as the appellant had already taken bath, certain medical evidence could not be found from the body of the victim and as the victim being a girl of tender age, was profusely bleeding on account of rape, evidence in the nature of sperm could not be found from the vaginal swab. There was injury on the private part of the victim and she was bleeding because of the injuries and looking to the medical evidence and evidence of Dr. Kavitaben Dudhrejia, PW No. 12 (Exh. 46), there is no reason to discard version of the victim given on oath that she had been raped by the appellant. The submission of learned advocate Shri Brahmbhatt that as no injury was found from the body of the appellant, one has to come to a conclusion that the appellant had not committed rape cannot be accepted. It is not that in each and every case where a girl of tender age is raped, there would be injury on the private parts of the accused. As stated hereinabove, the appellant is a young man with reasonably good health as he is working as a mason. Possibly, for that reason, he might not be having injury on his body. We, therefore, do not accept the submissions made by learned advocate Shri Brahmbhatt.

16. It is most pertinent to note here that age of the victim was around 13 years and 9 months. The victim, being a girl of a tender age, in our opinion, the learned Additional Sessions Judge has rightly inflicted punishment to undergo Rigorous Imprisonment for 8 years. We do not find any error in the quantum of punishment inflicted upon the appellant. For the reasons stated hereinabove, we are in agreement with the impugned judgement and the quantum of punishment inflicted upon the appellant and, therefore, we dismiss the appeal.

17. Record and Proceedings to be returned forthwith.

(ANIL R. DAVE, J.)

(K.S. JHAVERI, J.)

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